89-1612

Supreme Court, U.S.
FILED
APR 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE

Supreme Court of the United States

October Term, 1989

DARIUS IRBY, et al.,

Petitioners,

vs.

VIRGINIA STATE BOARD OF ELECTIONS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GERALD T. ZERKIN
LINDEN TOWER PROF. CENTRE
2ND & FRANKLIN STREETS
RICHMOND, VA 23219

NEIL BRADLEY
COUNSEL OF RECORD
KATHLEEN L. WILDE
LAUGHLIN McDONALD
44 FORSYTH STREET, N.W.
ATLANTA, GA 30303
(404) 523-2721
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION, INC.

COUNSEL FOR PETITIONERS

QUESTIONS PRESENTED FOR REVIEW

1. What is the standard of proof a State is required to meet to retain its school board appointment system which was held to be enacted for an invidious, racially discriminatory motive.

2. After a judicial finding that race was a substantial or motivating factor in the adoption of a State constitutional provision, may the articulation of race-neutral reasons, reasons not shown to be relied upon by the State, serve to meet the burden of proof required by Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1979), Hunter v. Underwood, 471 U.S. 222 (1985) and Price Waterhouse v. Hopkins, ___ U.S. ___, 109 S.Ct. 1775 (1989).

3. Is the court of appeals' decision in conflict with prior decisions of this Court which hold that the consequences of an intentionally discriminatory system are presumed to be the result of that intent, and that intent is not required under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973.

###

PARTIES

Petitioners-Plaintiffs: Darius Irby, John S. Neal, Charles W. White, Rev. James Samuel Williams, Jr., Cora Lee Tucker, Willie Powell, Milton Richardson, the Virginia Unit Of The Southern Christian Leadership Conference and Citizens For A Better America;

Respondents-Defendants: Susan H. Fitz-Hugh, Secretary of the Virginia State Board of Elections, the Virginia State Board of Elections, O. Paul Long, Roy C. Daniels, Everett Eppes, John L. Jenkins and Carol Hagaman, members of the School Board Selection Commission of Nottoway County; Eloise H. Powell, James R. King, JR. and G. Forest Ragland, members of the Electoral Board of Nottoway County; C. Hamilton Agee, Jr., Maury La Sueur and Nancy Morris, members of the School Board Selection Commission of Buckingham County;

Sam Wallace Shepard, Thomas N. Morgan and Thomas Joseph Sterger, members of the Electoral Board of Buckingham County; Hugh E. Carwile, Jr., Theresa A. Clark, James W. Garnett, Jr., William R. Hendley, Maurice H. Maxwell, Jr., James C. Moore, Marvin W. Scott and Chauncey Stokes, members of the Board of Supervisors of Prince Edward County; William E. Watson, S. Howard Ferguson, Jr. and Vanessa R. Venable, members of the Electoral Board of Prince Edward County; and Robert P. Lawler, Oscar B. Tate, Fulton C. Conner, Richard E. Abbott, Larry D. Clark, William E. Colman, Ruth S. Henderson and Huell W. Matthews, members of the Board of Supervisors of Halifax County; and Louis P. Woltz, Lucy A. Conner, and James W. Farrington, members of the Electoral Board of Halifax County; Florence S. Farley, M. Bruce Edwards, Garland L. Bigley, Charles H.

Cuthebert Annie M. Mickens, Richard H. West, Sr., and Joe R. East, Jr., members of the City County of the City of Petersburg; and Anne Aldridge, Rose King and Henry Clay Phillips, members of the Electoral Board of the City of Petersburg.

TABLE OF CONTENTS

Questions Presented for Review.....i

Parties to the Proceeding.....iii

Table of Contents.....vi

Table of Authorities.....vii

Opinions Below.....1

Jurisdiction.....2

Constitutional & Statutory Provisions Involved.....2

Statement of the Case.....3

Reasons for Granting the Writ.....21

I. The opinion of the court of appeals permitting the continuance of an intentionally discriminatory system is in conflict with prior decisions of this Court.....21

A. Virginia's Constitutional Provision Having Being Adopted in 1901-02 for Racially Discriminatory Reasons, With No Constitutionally Permissible Reason Being Present, Such Provision is Unenforceable Under the Constitution.....21

B. Having Found Intent to Discriminate, the Courts Below Should Have Followed Prior Decisions of this Court and Required Respondents to Prove by a Preponderance of the Evidence that The System Would Be in Place Even in the Absence of the Discriminatory Motivation.....24

II. The opinion of the court of appeals which refused to presume that racial effects following an intentionally discriminatory act are caused by that act conflicts with prior decisions of this Court and with Dowell v. Board of Education of Oklahoma City Public Schools, 890 F.2d 1483 (10th Cir. 1989), and involves unresolved issues regarding dismantling of discriminatory systems.....31

A. The Courts Below Failed to Apply Prior Decisions of this Court By Requiring Proof That The Discretionary Appointment System Compelled the Discriminatory Results.....31

B. The Court of Appeals' Intepretation of Section 2 of the Voting Rights Act Conflicts with the Act and with This Court's Opinion in Thornburg v. Gingles, 478 U.S. 30 (1986)....35

Conclusion.....38

TABLE OF AUTHORITIES

Alexander v. Louisiana, 405 U.S. 625 (1972).....34

Arlington Hts. v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).....36

Davis v. Schnell, 81 F.Supp. 872, aff'd per curiam, 336 U.S. 933 (1949).....34

Dowell v. Bd. of Ed. of Oklahoma City, 890 F.2d 1483 (10th Cir. 1989), cert. granted 58 U.S.L.W. 3614 (U.S. Mar. 26, 1990)(No. 89-1080)..31,35

Giles v. Harris, 189 U.S. 475, 23 S.Ct. 639 (1903).....33

Green v. County Sch. Bd., 391 U.S. 430 (1968).....28

Harman v. Forsennius, 380 U.S. 528 (1965).....3

Hunter v. Underwood, 471 U.S. 222 (1985).....i,16,22,28

Irby v. Fitz-Hugh, 692 F.Supp. 610 (E.D. Va. 1988).....1

Irby v. Fitz-Hugh, 693 F.Supp. 424 (E.D. Va. 1988).....1

Irby v. Virginia State Board of Elections, 889 F.2d 1352 (4th Cir. 1989).....1

Keyes v. Sch. Dist. No. 1, Denver, 413 U.S. 189, 211 (1973).....33

Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274 (1977).....passim

Price Waterhouse v. Hopkins, ___ U.S. ___, 109 S.Ct. 1775 (1989).....i,25

City of Richmond v. United States, 422 U.S. 358 (1975).....23

Swann v. Charlotte-Mecklenburg Bd. of Education, 402 U.S. 1 (1971).....33

Thornburg v. Gingles, 478 U.S. 30, (1986).....35,36

Ex parte Virginia, 100 U.S. 303 (1881)..34

Constitutional & Statutory Provisions

Amendment 1.....2,20

Amendment 13.....2,20

Amendment 14.....2,20

Amendment 15.....2,20

28 U.S.C. § 1254(1).....2

28 U.S.C. § 1331.....4

28 U.S.C. § 1343(3) and (4).....4

28 U.S.C. § 2201.....4

42 U.S.C. § 1973, Section 2 of the Voting Rights Act of 1965.....ii,2,20,36

42 U.S.C. § 1983.....4

Acts of Virginia, 1947, Chapter 61.....6

Acts of Virginia, 1956, Chapter 591.2,7,35

Va. Code § 15.1.609, 644, 708 & 770.....6

Va. Code § 22.1-34.....6

Va. Code § 22.1-50.....6

Va. Code § 22.1-153.....6

Other Authorities

Proceedings and Debates of the Virginia House of Delegates Pertaining to Amendment of the Constitution (1969)..28

Report of the Proceedings & Debates of the Constitutional Convention, State of Virginia, 1901-02 (Richmond, 1906)..5

S.Rep. 97-417, 97th Cong., 2d Sess. (1982).....35

###

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

DARIUS IRBY, et al.,

Petitioners,

vs.

VIRGINIA STATE BOARD OF ELECTIONS, et al., etc.,

Respondents.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported as Irby v. Virginia State Board of Elections, 889 F.2d 1352. The findings of fact and conclusions of law of the district court are reported sub nom. Irby v. Fitz-Hugh, 693 F.Supp. 424 (E.D. Va. 1988), and the opinion of the district court on summary judgment is reported at 692 F.Supp. 610.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 1989. The order of the court of appeals denying the petition for rehearing and suggestion for rehearing in banc was entered on January 9, 1990.

This Court has jurisdiction to review the judgment under 28 U.S.C. §1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS

The constitutional and statutory provisions are contained in the separately bound appendix to this petition. They are the first, thirteenth, fourteenth and fifteenth amendments to the Constitution of the United States, Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, and Chapter 591 of the Acts of Virginia of 1956, which repealed a provision allowing for the election of

school board members and prohibited such elections.

STATEMENT OF THE CASE

In 1901-02 Virginia held a Redeemer constitutional convention, the purpose being to restore white supremacy. This Court has found racial motivation in that convention. Harman v. Forsennius, 380 U.S. 528 (1965).

Plaintiffs, petitioners here, challenged the decision of that convention to reject a proposal to have elected school boards as being intended to prohibit black citizens from both serving on school boards and participating in the selection of school board members.[1] Both

---

1. This action was brought by seven individual black citizens, residing in the City of Petersburg, and Nottoway, Buckingham, Prince Edward and Halifax Counties, together with two civil rights organizations. Defendants were the Secretary of

courts below determined that the decision of the Constitutional Convention of 1901-02, which rejected elected school boards in favor of an appointive system, was adopted with the intent to discriminate against black citizens. 6a, 140a. The record amply supports these findings.

The report of the education committee at that convention recommending elected school boards was explicitly rejected for racially discriminatory reasons. 7a. A member of the Committee on Education, J.B.T. Thornton, opposed the election of

---

(Footnote 1 cont.)

the Virginia State Board of Elections and the Board, together with the members of local electoral boards and the bodies which appoint local school board members.

The jurisdiction of the district court was based on 28 U.S.C. §§ 1331, 1343(3), 1343(4) and 2201 and 42 U.S.C. § 1983.

school boards with the following argument:

> [I] shall vote against the report made by the committee for this reason... Although it is claimed that the white people control absolutely their local affairs throughout the State, it is a mistake, and if this report is adopted, as presented here, there are a number of counties in the State in which we will have negro trustees. That is a condition of affairs that is abhorrent... I believe we would be doing injustice to the white people of the State to undertake to place election of trustees in the hands of the people.

Report of the Proceedings and Debates of the Constitutional Convention, State of Virginia, 1901-02, 1829 (Richmond, 1906). 46a.

The result of the rejection of the proposal for elected school boards was that the convention left the method of school board selection to be determined by the legislature, and the legislature in 1903 opted to continue appointed school boards. That decision continues in force today.

The Methods of Appointment

Local school boards are appointed using one of two methods. The school board is either appointed by a three person school board selection commission, which in turn is appointed by the local circuit court judge, or by the local governing bodies--city and town councils and county supervisors.[2] The power of appointment rests in one of these two bodies, and there have never been elected school boards except for one decade in which Arlington County residents were allowed to elect their school board.

The Short-Lived Arlington Option

An act of the General Assembly in 1947, Acts, 1947, Chapter 61, permitted counties with a county manager which had

---

2. Va. Code §§ 22.1-34, 15.1-609, 644, 708 and 770; 22.1-50 and 22-153.

abolished magisterial districts to elect their school boards. Only Arlington County qualified, and switched, at that time. 61a. When Arlington's school board voted to adopt a school desegregation proposal in 1956, the legislature abolished the elected board. The repeal was not limited to Arlington, but prescribed that "no school board shall be elected by popular vote in and for any county or city." Acts of Virginia, 1956, Chapter 591, 161a.

The district court found as fact that "the General Assembly abolished Arlington's elective system as part of a program of 'massive resistance' to court-ordered school desegregation." 119a. The court of appeals agreed that "the Virginia legislature clearly acted with a discriminatory purpose in passing the 1956 law

forbidding popularly elected school boards anywhere in the state." 14a-15a.

Thus the last time the full legislature of Virginia voted on a statute to have elected school boards, it returned to an all appointment system, and acted with an invidiously discriminatory motive. Although the state constitution was subsequently revised, the provision authorizing the legislature to choose the method of school board selection was not changed, and the legislature has never given serious consideration to elected school boards.

The Constitutional Revision Of 1971

Between 1968 and 1971, Virginia's constitution was revised. One of several purposes of the revision was to close the door on the era of massive resistance to school integration. A blue ribbon commission was appointed to propose changes in

the constitution, and although the members of the commission were aware of the 1901-02 convention debates on school board selection, there is no record that the commission considered school board selection, and it did not recommend any changes in the method of selection. At that time, the district found, there "were few blacks on Virginia's school boards..." 127a.

After the commission produced its recommendations, the legislature met as a convention, its debates recorded and transcribed. The method of school board selection was barely discussed, and the district court found as fact that the convention "simply could not agree on which method was best and put the debate off to another day by agreeing to preserve

the flexibility that currently existed." 123a.[3]

Other racial issues were debated in the 1971 revision process. Tuition grants to students attending private schools had their origin in massive resistance. But in the convention, non-discriminatory reasons for retention of tuition grants were debated, as were the discriminatory history of the grants and the language of the provision, Trial transcript, 44-48, 384, and tuition grants were put into the new constitution. In contrast, "the school board selection provision...was retained without change and with virtually no debate." 17a.

---

3. The district court granted plaintiffs' motion in limine to prohibit the introduction of testimony by legislators of after the fact explanations or interpretations of the legislative history. 94a-101a.

Since the constitutional revision of 1971, which retained the authority of the legislature to prescribe the method of school board selection, there have been some statutory modifications in how appointments are made, 123a, but all bills proposing elective boards failed. Between 1971 and 1988 there were 48 bills introduced to change to elected school boards; most were killed in committee and none were voted on by the full legislature. 125a, Trial Transcript 126.

In 1984, a legislative subcommittee filed a study report which "discuss[ed] the arguments for and against the appointment of members of the school board." 126a. The district court found that "[t]he report presents legitimate, non-racial reasons for appointing school board members..." 126a, 17a. The court of appeals noted, however, that the "sub-

committee report took no stance on the issue but reported the various arguments for and against electing school boards." 10a.

There was no evidence that the legislature relied upon this listing in killing the numerous proposals to elect school boards. 18a, n. 2. Nor did the subcommittee study the racial history and effect of school board appointments. The chairman of the house subcommittee which produced the 1984 study report testified that race "was never an issue, never brought to our committee that the manner in which we were presently operating..., was never an issue, that race was not an issue in our state." Trial deposition of Ford Quillen, 34.

The Racial Effects

Plaintiffs' complaint is that the 1901-02 constitutional provision was

intended to prohibit blacks both from serving on school boards and from choosing those who serve, and continues to have the intended result.

Although the number of blacks serving on school boards across the state matches their numbers in the statewide population --approximately 18 percent, 27a--the evidence is undisputed that (1) there are a number of local jurisdictions in which blacks are underrepresented on school boards; (2) the local appointing bodies remain overwhelmingly white; and (3) black citizens are still denied the right to vote for members of school boards.

Blacks are underrepresented by at least one seat in 26 counties and four cities. Plaintiffs' Exhibits 3 and 4. Blacks are underrepresented in 20 of the 40 jurisdictions with a black population exceeding 30%. Plaintiffs' Exhibit 8. In

six counties where blacks make up between 30 and 48% of the population, blacks are underrepresented by two members. Plaintiffs' Exhibit 1. There are no black members on 50 of the 136 local school boards. Plaintiffs' Exhibit 2. Forty-five of Virginia's 95 counties appoint school boards by selection commission. In every one of those 45 counties a white circuit judge still appoints the selection commission.

Buckingham County is an example of how the appointment system works to limit black participation on school boards and in the appointing authority. The parties stipulated that since 1971, every black "who has formally requested appointment by the Buckingham County School Trustee Electoral Board to the Buckingham County School Board has been appointed." Stipulation of June 28, 1988. Buckingham is a

42% black county, and since 1971 there has always been one, but never more, black on the seven member school board. And the appointing commission "is composed of and has always been composed of only white members. Ibid.

There is continuing overt racial discrimination in the appointment of school boards. In Pittsylvania County, a 53 year old black school board applicant was asked "whose boy are you," and since he was a member of the NAACP, was asked what he would do "if the NAACP came in and decided to close the school?" T. 171-72. In Southampton County, which is 48% black, the commission appointed a white woman whose children had attended an all white academy to the school board over a black woman supported by a black county supervisor. T. 179-80. Henrico County, an urban county adjacent to Richmond with

a 20% black population, has never had a black school board member on its five person board. In 1988, a concerted effort by the black community to have a black appointed resulted in four new members--all white--being appointed. T. 192-93.

Virginia did not contest the existence of recent overt racial acts in the appointment of school board members. It argued that "those were personal acts of discrimination and disparaging remarks which are abhorrent to right-thinking Virginians..." T. 442.

The Holdings

The district court found that "[r]ace was a 'substantial' or 'motivating' factor, Hunter v. Underwood, 471 U.S. 222, 228 (1985), behind the 1901-02 Constitutional Convention's decision to retain an appointive system," 140a, a finding affirmed by the court of appeals. 14a.

Similarly, the 1956 repeal of Arlington's elected school board was found to be racially motivated. 143a, 14a.

The district court's conclusion on the 1971 constitutional revision and the subsequent failure of legislation proposing elected school boards was that "[t]he state has carried its burden of proof in demonstrating that at least since 1971 the system has not been maintained for racially discriminatory reasons...." 145a. The district court noted that "[t]he 1984 legislative study also presents legitimate non-discriminatory reasons for preserving appointive boards." 145a.

The court of appeals, while not agreeing that the silent 1971 legislative record met the state's burden, held that the reliance on the 1984 study report was "a much more persuasive piece of evidence

in finding that the defendants had met their burden of rebutting the inference of discriminatory intent." 17a. Though it acknowledged that the study report "took no stance on the issue," 10a, and criticized the district court for not investigating "the legislative debate over the various bills to determine whether supporters of appointed school boards articulated the arguments found in the 1984 study," 18a, n. 2, the court of appeals held the report sufficient to rebut "the inference of discriminatory intent." 17a.

Having concluded that the direct evidence (and findings) of intent had been in effect negated, both courts examined the racial effects from the perspective of inferring intent to discriminate. 148a, 27a-33a. Although the evidence of black underrepresentation on school boards and of exclusion from the power of appointment

was undisputed, 83a, 130a-131a, the district court held there was no proof "that the appointive sytem is responsible for this disparity," 148a, or "that the appointive system hinders" blacks in gaining appointments. 150a.

The court of appeals agreed that plaintiffs were required to prove the system caused the effects and had not done so. The court of appeals ruled, inter alia, that plaintiffs did not show "a causal link between the appointive system and black underrepresentation...." 31a. It also ruled that white control of the appointive process did not demonstrate a discriminatory impact. It ruled that a complaint about appointments being made by white elected officials could only be addressed by a direct Voting Rights Act challenge to their electoral schemes. 32a. As for the appointment of selection

commissions by white judges, the court of appeals ruled that "[a]s for the fact that white judges are ultimately, though indirectly, responsible for selection of school board members...," plaintiffs would be required to produce evidence of racial discrimination in the selection of those judges. 32a-33a. (Emphasis in original.)

Accordingly, both courts concluded there was no racially discriminatory impact of the appointive process, and rejected the fourteenth amendment, fifteenth amendment and Section 2 of the Voting Rights Act claims.

Prior to trial the district court had granted summary judgment on plaintiffs' first and thirteenth amendment claims, 52a-53a, and the court of appeals affirmed. 34a.

REASONS FOR GRANTING THE WRIT

I.

The opinion of the court of appeals permitting the continuance of an intentionally discriminatory system is in conflict with prior decisions of this Court.

A. Virginia's Constitutional Provision Having Been Adopted in 1901-02 For Racially Discriminatory Reasons, With No Constitutionally Permissible Reason Being Present, Such Provision is Unenforceable Under the Constitution.

The discriminatory intent of the constitutional convention of 1901-02 in rejecting elected school boards has not been in issue in this case.

Virginia did not contest the proof of racial motive in the 1901-02 convention, but merely argued that it was irrelevant. In the court of appeals, Virginia conceded that "plaintiffs were able to prove [] that at one point 87 years ago, the appointive system was maintained, at least in part, for an improper purpose."

Brief of Appellees, U.S. Court of Appeals for the Fourth Circuit, No. 88-2919, p. 30. Both courts below found the 1901-02 convention rejected elected school boards for racial reasons. Supra, 16.[4]

Unlike Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274 (1977), this is not a situation of mixed motivations, some legitimate and some not. Both parties

---

4. The only evidence of another motivation for this decision in the convention record was that the delegates also intended to discriminate against poor whites. 116a. The district court held that "[t]he intent...was to reduce poor whites and blacks to the status of women--disenfranchised." Ibid. Whether or not an intent to discriminate against poor whites could salvage the provision, cf., Hunter v. Underwood, 471 U.S. 222, 231-32 (1985), the State was unable to establish the convention delegates would have acted solely against poor whites. Even defendants' expert witness, Dr. Peter Stewart, who advanced the economic discrimination defense, conceded that the effect on poor whites did not alter the intent to discriminate against blacks. Trial Transcript, 246-48.

examined the historical record and found only illegitimate motives for the decision to have appointed school boards. The provision, intended to discriminate against black citizens by excluding them from service on school boards and in having a voice in who serves on school boards, is invalid under the thirteenth, fourteenth, and fifteenth amendments and Section 2 of the Voting Rights Act.

Since that is the system in place, judgment should have been entered invalidating the provision. Instead, the courts below held constitutional this provision which they found to be adopted for invidiously discriminatory reasons. That is contrary to City of Richmond v. United States, 422 U.S. 358, 378 (1975) ("An official action...taken for the purpose of discriminating against Negroes on account of their race has no legitimacy

at all under our Constitution...") The validation of such discriminatory action is a decision of national importance and merits review by this Court.

B. Having Found Intent to Discriminate, the Courts Below Should Have Followed Prior Decisions of this Court and Required Respondents to Prove by a Preponderance of the Evidence that The System Would Be in Place Even in the Absence of the Discriminatory Motivation.

Plaintiffs have argued in Point A that the record of the 1901-02 convention revealed no legitimate motivation. But if Virginia is allowed to justify the decision by subsequent motivations, then Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274 (1977), is the standard it must meet.

Once invidious discriminatory intent has been proved, this Court has required that the burden of proof shift to those who defend a decision to prove by a preponderance of the evidence that the

same decision would have been made even in the absence of the illicit motive. Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274 (1977); Price Waterhouse v. Hopkins, ___ U.S. ___, 109 S.Ct. 1775 (1989).

Neither court below shifted the burden of proof. Instead, both concluded merely that there was no proof of racial motivation after 1971. That is not the equivalent of proving by a preponderance of the evidence that the system would be in place absent the prior illicit motivation.

The court of appeals did not discuss Mt. Healthy. It held, "We need not decide whether the Equal Protection Clause mandates the burden-shifting scheme proposed by the plaintiffs because, even assuming that the burden shifted to the defendants, they have proved that racial discrimina-

tion no longer motivates Virginia's decision..." 14a.[5] Thus the standard the court required of Virginia was to prove there was no new intent.

The courts found "smoking gun" racial motivation first in 1901-02 and again in 1956. 14a. Given that intent, Mt. Healthy requires that the state show by a preponderance of evidence that the system would be in place even absent the illicit motive.

There was no such evidence.

At no time since 1901-02 has the state reconsidered its school board appointment system and (1) considered the

---

5. The court of appeals characterized plaintiffs' "scheme" as shifting "the burden to the defendants to prove that the system is not currently being maintained for discriminatory purposes." 13a. With due respect, that is not the standard plaintiffs proposed. The correct standard is that outlined in Mt. Healthy.

prior racial motivation and the existing effects at the time of the reconsideration, (2) weighed those against race neutral considerations, and (3) decided that in spite of the prior racial purpose and current effects that it desired to continue the appointive system for such race neutral reasons.[6] That, at a minimum, is what is required by Mt. Healthy.

Not only did the courts below fail to require Virginia to meet this burden, but on a more fundamental level, Virginia has never purged the conceded racial discrimination of its appointed school board system. It has never repealed its

---

6. Compare the 1971 convention debates on tuition grants, a formerly discriminatory device debated and retained for race neutral reasons. Virginia failed to make a similar record on school board selection.

discriminatory provisions and re-enacted the same system. Compare, Hunter v. Underwood, 471 U.S. 222 (1985). It has never purged its discriminatory effects. Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 438 (1968)(affirmative duty to eliminate discrimination "root and branch").

The last time the full legislature voted on whether or nor to have elected school boards, it repealed the Arlington option, a decision found to racially motivated.

There has been no serious consideration of elected school boards subsequent to 1970.[7] Trial Transcript,

---

7. In 1968, a bill which would have provided local options for elected school boards was killed by a leader of massive resistance. Trial Transcript, 38-9. That delegate made his views on racial harmony known during the 1969 convention debates on the education articles:

126. Bills proposing electing boards are primarily killed in committee. Plaintiffs put on evidence of the obvious; it is easier to kill bills than to change the status quo. Ibid., 125. Supporters of appointed school boards have the advantage of the status quo, an advantage that exists because of illicit motive.

The 1984 study report serves as a listing of arguments for and against electing school boards, but, as the court

(Foonote 7 cont.)

> Black Sambo has been withdrawn from the [library] list, the story that did more than anything to bring white and colored children to play together and to love each other. Black Sambo has been taken out of the library. Old Black Joe--they just do not think [sic: sing] that any more.

Proceedings and Debates of the Virginia House of Delegates Pertaining to Amendment of the Constitution (Ex. Sess. 1969, Reg. Sess. 1970), 299 (Mar. 28, 1969), Trial Transcript, 56.

of appeals found, there is no evidence that this list has been relied on in legislation. The existence of possible legitimate reasons for maintaining the appointive system is not the equivalent of proving by a preponderance of the evidence that these are the reasons on which Virginia relied. And the racial impact of the system was not studied by that 1984 subcommittee. Supra, 12.

In short, Virginia did not offer any evidence to carry its burden under Mt. Healthy. Virginia has never purged the conceded racial intent. The opinion of the court of appeals that the evidence of no new overt racial motivation and the mere articulation of race neutral reasons, not shown to be relied on by the state, are sufficient to validate a state action found to be racially motivated merits review by this Court.

II.

The opinion of the court of appeals which refused to presume that racial effects following an intentionally discriminatory act are caused by that act conflicts with prior decisions of this Court and with Dowell v. Board of Education of Oklahoma City Public Schools, 890 F.2d 1483 (10th Cir. 1989), and raises unresolved issues regarding dismantling discriminatory systems.

A. The Courts Below Failed to Apply Prior Decisions of this Court By Requiring Proof That The Discretionary Appointment System Compelled the Discriminatory Results.

This Court recently granted review on the issue of whether a school system, once determined to be intentionally discriminatory, should have its subsequent actions scrutinized merely for lack of intent or whether it has the burden of proving disparate results are not caused by the prior discrimination. Board of Ed. of Oklahoma City Public Schools v. Dowell, cert. granted 58 U.S.L.W. 3614 (U.S. Mar. 26, 1990)(No. 89-1080), reported below sub

nom. Dowell v. Board of Ed. of Oklahoma City Public Schools, 890 F.2d 1483 (10th Cir. 1989). The court of appeals for the fourth ciruit reviewed current effects of Virginia's appointive system as if prior discriminatory intent had not been judicially determined.

Having shown racial motive, the most plaintiffs were required to show was the existence of racial results. The courts below analyzed the results in terms of whether or not they were sufficient to infer intent. They required that plaintiffs prove that the appointive system is responsible for the disparities, supra, 19, and that the overwhelmingly white composition of the appointing bodies was the product of independent discrimination, despite this being precisely what was intended by the members of the 1901-02

convention.[8]

Once intent is shown, this Court has held there is a presumption that current effects are the result of past intentional discrimination. See, Keyes v. Sch. Dist. No. 1, Denver, 413 U.S. 189, 211 (1973) ("Thus, if respondent...cannot disprove segregative intent, it can rebut the prima facie case only by showing that its past segregative acts did not create or contribute to the current segregated condition..."); Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 26

---

8. So, for example, the court demanded proof as to why all of the judges who appoint selection commissions are white. Whether black judges could be appointed who would then frustrate the intent, that situation has never existed, nor would it purge the intent. Giles v. Harris, 189 U.S. 475, 23 S.Ct. 639, 642 (1903)("it would be a new doctrine in constitutional law that the original invalidity could be cured by an administration which defeated their intent").

(1971)(system with history of discrimination has burden of showing current actions are genuinely nondiscriminatory). When state law provisions are intended to place unfettered discretion in the hands of white officials to discriminate, and discrimination follows, this Court has never required proof that state law compelled the discrimination. Cf. Ex parte Virginia, 100 U.S. 303 (1881); Alexander v. Louisiana, 405 U.S. 625 (1972). Davis v. Schnell, 81 S.Supp. 872 (S.D.Ala.), aff'd per curiam, 336 U.S. 933 (1949).

Virginia's system was intended to provide discretion in the appointment process, with the hope and expectation that this discretion would be used to bar blacks from participation. When a 53 year old black man sought appointment and was asked, "whose boy are you," Trial Tran-

script, 171, the selection commission member who asked that question was not compelled to act in a racist manner. But he acted just as the 1901 convention members hoped and expected he would.

The court of appeals' holding that racial effects must be compelled by the appointive system was, in effect, requiring effects sufficient to infer intent. This is inconsistent with prior decisions of this Court on burdens of proof after intent has been found, and, particularly in light of Dowell, presents an issue of national importance.

B. The Court of Appeals' Intepretation of Section 2 of the Voting Rights Act Conflicts with the Act and with This Court's Opinion in Thornburg v. Gingles, 478 U.S. 30 (1986).

Section 2 prohibits intentional discrimination in voting legislation, S.Rep. No. 97-417, 97th Cong., 2d Sess. 27 (1982). Chapter 591, Acts of Virginia,

1956, prohibited elected school boards. 161a. The court of appeals found "the Virginia legislature clearly acted with a discriminatory purpose in passing the 1956 law forbidding popularly elected school boards anywhere in Virginia." 14a-15a. Nonetheless, it refused to invalidate that statute under Section 2. The legislative history of Section 2 strongly suggests that once intent is shown, the act should be invalidated. The Senate Report, ibid., 27, n. 108, by citing Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977), for the analysis of intent, and not citing Mt. Healthy, decided the same day, indicates Congress' belief that a finding of intent ended the inquiry.

Beyond the evidence of overt intent, the court of appeals requirement that plaintiffs prove that the discriminatory

results were compelled by the selection system was, in effect, another way of requiring circumstantial proof of intent under Section 2. This conflicts with Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, as interpreted by this Court in Thornburg v. Gingles, 478 U.S. 30, 73 (1986).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted to review the judgment and opinion of the court of appeals.

Respectfully submitted,

Neil Bradley
Counsel of Record
Kathleen Wilde
Laughlin McDonald
44 Forsyth Street, NW
Atlanta, GA 30303
ACLU Foundation, Inc.

Gerald T. Zerkin
2nd & Franklin Streets
Richmond, VA 23219

COUNSEL FOR PETITIONERS